

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PHYLLIS SCHLAFLY REVOCABLE TRUST,)
et al.,)
)
Plaintiffs,)
)
v.)
) No 4:16-CV-1631 RWS
ANNE CORI, et al.,)
)
Defendants.)

STATUS HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
MAY 3, 2023

APPEARANCES:

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(PROCEEDINGS STARTED AT 11:21 AM.)

THE COURT: Good morning. So we're here in the case styled Phyllis Schlafly Revocable Trust, et al., against Cori, et al., 4:16-CV-1631.

Would counsel make their appearances, please.

MR. NORTHON: Thank you, Your Honor. Ian Northon on behalf of plaintiffs.

MS. FARRELL: Kelley Farrell on behalf of the plaintiffs.

MR. BLACKWELL: And Andrew Blackwell on behalf of the plaintiffs, Your Honor.

MR. SOLVERUD: Erik Solverud and Arthur Gregg on behalf of defendant.

THE COURT: Very good. So I'm the newest member of the case. Who's going to bring me up to speed?

Mr. Solverud, did you want to give it a shot?

MR. SOLVERUD: I'll let Mr. Gregg do that.

THE COURT: That's fine. And then, obviously, if you haven't been with me before, nobody leaves the room without saying everything they wanted to say. So if you don't like what someone said, don't panic. You'll get plenty of time for rebuttal.

MR. GREGG: Good morning, Your Honor.

THE COURT: Morning.

MR. GREGG: So I think if we're talking about getting

1 up to speed --

2 THE COURT: And where to go from here.

3 MR. GREGG: And where to go from here. You know, I
4 think, as Your Honor is aware, Judge Ross appointed Judge
5 Seigel as Special Master to oversee certain discovery disputes
6 in these proceedings.

7 You know, as Your Honor is probably aware just from
8 the docket sheet, defendant filed motions to compel to get
9 document productions for Phase II discovery. We filed motions
10 to strike regarding expert disclosures that were not timely
11 made.

12 There were, I think, a litany of noncompliance on
13 behalf of the plaintiffs where their discovery obligations led
14 us to the appointment of a Special Master. And those
15 Special Master proceedings began in January of 2023, this
16 year. It was a 60-day referral to Judge Seigel for
17 Special Master proceedings. And, unfortunately, a lot of
18 these issues are still kind of -- they haven't moved forward
19 or resolved themselves.

20 I think the best way to talk about this from the
21 perspective of where we are is what defendant still feels she
22 needs to have this case be ready for trial. And I think the
23 first thing that defendant needs is we need to fix the issues
24 with the data set that was prepared by plaintiffs in
25 responding to their Phase I and Phase II discovery.

1 A huge chunk of the data relied on by plaintiffs was
2 compiled by other lawyers in other lawsuits, and that creates
3 a problem because they can't say whether the data is fully
4 intact. They can't say whether search terms were run on it.
5 They can't say whether it represents an actual collection of
6 the plaintiffs.

7 I mean, the two lawsuits that was the source for this
8 data was Madison County and the Southern District of Illinois.
9 Neither of those cases even had the Phyllis Schlafly Revocable
10 Trust as a party.

11 So there are three custodians that are that data:
12 Bruce Schlafly, John Schlafly, and Ed Martin. And it's their
13 emails from January 2015 through December of 2017. So I think
14 we need to fix that data because you can't build a discovery
15 collection on quicksand; there's no foundation, and the whole
16 thing is compromised.

17 And, Your Honor, that's the subject, in part, of
18 Document No. 257, which is our motion for discovery sanctions
19 pursuant to Rule 237(b)(2) of the Federal Rules of Civil
20 Procedure.

21 The second thing we need, Your Honor, is we need our
22 own search terms to be run on the complete data set. So
23 plaintiffs, in response to Judge Ross's orders to finally get
24 this discovery out the door -- I mean, the first production we
25 had in Phase II was January 4 of 2023, and it was 219,000

1 pages. If you look at the second amended scheduling order,
2 that production was more than a month after the discovery
3 cutoff in this case.

4 So in their rush to get that document dump out the
5 door and on us, they used their own search terms. Now, we've
6 provided some additional search terms to supplement where we
7 think their search terms fell short, but now what we've
8 discovered through the proceedings with Judge Seigel is that
9 they used this technology-assisted review, TAR, program and
10 predictive coding that has all kinds of flaws in it and all
11 kinds of issues. I mean, it's the subject of our motion for
12 sanctions that we presented to Judge Seigel last week that
13 information relating to the ESI and the TAR was being
14 withheld.

15 And the case law on this, Your Honor, is if a party
16 is going to impose an ESI protocol and is going to
17 unilaterally apply search terms, they need to be up-front and
18 transparent about that. The burden is on them to show it was
19 done right. And we only just now, last week, received
20 information showing that it appears to have been done all
21 wrong.

22 I mean, we're still consulting with our own kind of
23 experts on e-discovery and how a collection should have gone
24 and how technology-assisted review should be performed; but, I
25 mean, our initial reactions are this was done all wrong. So

1 we need to get our own search terms that we propose and
2 negotiate to be used as kind of the crux to address those
3 issues.

4 The second thing we need is plaintiffs need to
5 provide a complete privilege log. This is the subject of
6 Document 290, defendant's supplement to her motion for
7 sanctions.

8 So in response to Judge Ross's order to have
9 plaintiffs get the ball moving and get this going, we got, on
10 January 11, 2023, a privilege log with 15,148 entries. And
11 just for an example of how that document was so flawed, 8,000
12 of those documents the "email to" or "email from" was blank;
13 so you couldn't assess the privilege because you wouldn't know
14 who was sending the document or who was receiving the
15 documents.

16 Judge Seigel gave plaintiffs two drop-dead dates in
17 March and April to fix these issues, and that's set forth more
18 fully in our supplement to motion for sanctions. But, you
19 know, the most recent status is by that second drop-dead date,
20 April 19, we now have a 10,000-entry privilege log with more
21 than 4,000 blanks in it on "email to," "email from." And then
22 the next day we got another privilege log with 1,900 entries.
23 More than 1,000 of them were blank.

24 So we need to figure out, create a single, unified
25 privilege log that says the information you need for a

1 privilege log. After that, defendant needs to be able to
2 review the privilege log and challenge the assertions of
3 privilege, because all that's really happened with the
4 privilege log is about 5,000 documents were produced that
5 everybody agreed shouldn't have been on the privilege log in
6 the first place. There was never any contested motion about
7 the 5,000 documents. It was just these clearly have
8 nonparties turn them over. So we're still dealing with these
9 blanks on this privilege log.

10 And, Your Honor, the account from plaintiffs' counsel
11 is that the privilege log is so flawed because that original
12 data set was corrupted. The data set I talked about, they
13 couldn't extrapolate the "to" or "from" and generate it
14 themselves.

15 Next, Your Honor, defendant needs to complete a
16 deposition of plaintiffs' damages expert. Now, we've taken
17 the deposition of plaintiffs' testamentary capacity expert,
18 and we've actually filed a motion to strike on that expert
19 witness. That's Document No. -- this is two forty -- 282,
20 Your Honor. That's our motion to strike plaintiffs'
21 testamentary capacity expert witness, Larry Huntoon.

22 We're completing tomorrow the deposition of
23 plaintiffs' damages expert, and we need time to file a motion
24 to strike for that expert as well.

25 Defendant needs to make her own Rule 26(a)(2)

1 disclosure of experts for initial and to rebut the testimony
2 that we've gotten from plaintiffs, you know, in the event it's
3 not stricken by this Court. We need to make our experts
4 available for deposition.

5 THE COURT: You don't think we're going to trial this
6 month?

7 MR. GREGG: I have a slightly jaundiced view of the
8 current trial setting, Your Honor.

9 THE COURT: All right. Just checking.

10 MR. GREGG: Just checking, I agree.

11 And I think, you know, finally, Your Honor, when we
12 get through the expert issues, the privilege log issues, and
13 the document issues, I think we need to take our Phase II
14 depositions of the corporate representatives of plaintiffs.

15 You know, Judge Ross set this up as a Phase II.
16 Plaintiffs have already taken my client and Cori's Phase II
17 deposition. They've already conducted and gotten their
18 Phase II discovery responses from us.

19 I don't believe before Judge Seigel there's anything
20 pending that they've asked for from defendant that's
21 outstanding. We have provided documents. We've provided
22 logs. We have reviewed deposition testimony and made rulings
23 on answers that have been provided and objections that were
24 made.

25 But we still need the corporate rep depo of each of

1 the plaintiffs, including -- and also John Schlafly in his
2 individual capacity. He's a trustee of two of the trusts, of
3 two of the plaintiffs, and he's also a director and officer of
4 EFELDF. That's the third plaintiff, Eagle Forum Education and
5 Legal Defense Fund.

6 We also want to take the deposition of JoAnne Jouett,
7 who's a trustee and employee of Eagle Trust Fund and, finally,
8 Bruce Schlafly, who is, I believe, a director of Eagle Forum
9 Education and Legal Defense Fund and a former trustee of Eagle
10 Trust Fund.

11 And then I think what's last is, you know, there are
12 certain pending motions before the Court that I think will
13 expedite and could substantially narrow things, but I think we
14 need some resolution on some of the pending motions that have
15 been on file since the fall of 2022.

16 And, Your Honor, I've prepared a binder, a courtesy
17 copy, of motions that are pending or that are resolved in part
18 that I'm happy to provide you and kind of talk you through, if
19 there's no objection.

20 THE COURT: Any issue as to the plaintiffs?

21 MS. FARRELL: Do you have a copy for us?

22 MR. GREGG: I --

23 MS. FARRELL: Thanks.

24 MR. GREGG: Yeah.

25 THE COURT: Make sure they know what you're handing

1 the Court.

2 MR. GREGG: And, Your Honor, I'll read through it
3 really quick as well.

4 THE COURT: Okay.

5 MR. GREGG: So, Your Honor, in the binder I've handed
6 you is Document No. 255, which is our motion to compel
7 discovery and amend second amended scheduling order.
8 Plaintiffs never filed a response to this motion. Judge Ross
9 granted it in part as to the motion to compel, but the motion
10 to amend the scheduling order is still outstanding.

11 The next document I draw your attention to is Doc
12 No. 257. This is our motion for discovery sanctions pursuant
13 to Rule 237(b)(2) of the Federal Rules of Civil Procedure.
14 It's fully briefed, and the briefing is contained in that
15 binder.

16 This relates in part to the compromised data set and
17 Judge Ross's previous order that plaintiffs could not rely
18 solely on documents prepared by other lawyers in other
19 lawsuits to satisfy their own independent discovery
20 obligations in this lawsuit.

21 The next document I draw your attention to is
22 Document No. 280. This is our motion to enforce compliance
23 with the Special Master Order No. 2. That's pending before
24 Judge Seigel. And, actually, subsequent orders have addressed
25 topics contained within that order, but because other motions

1 rely on it and cite it to, I've included it for Your Honor.

2 The next, Your Honor, is Document No. 282. That is
3 defendants' motion to strike plaintiffs' testamentary capacity
4 expert witness, Dr. Lawrence Huntoon. And, Your Honor, I've
5 included -- and plaintiffs have never filed a response to that
6 motion even though it was filed on March 22, 2023.

7 And, Your Honor, I've included in the binder Document
8 No. 248. That's our related motion to strike plaintiffs'
9 expert witness disclosures. That's back from August of 2022.
10 This motion is relied on and cited by our motion to strike
11 Dr. Huntoon.

12 The second motion, the expert disclosure's motion,
13 was denied as moot without prejudice by Judge Ross because it
14 related to certain proceedings in front of Judge Seigel, but
15 defendant, at the same time, was granted leave to refile that
16 motion at a later date if necessary. And so I'm including it
17 because either in its current form, as relied on by other
18 motions, I think it's relevant, or it may be coming down the
19 pipeline in short order.

20 THE COURT: I understand I need to deal with the
21 scheduling issues, but which of these have been argued to the
22 Special Master?

23 MR. GREGG: So the only motions that have been argued
24 to the Special Master are our motion to enforce compliance
25 with Special Master Order No. 2 and then the last two items in

1 your binder, Document No. 289 and 290, which is our motion for
2 sanctions and our supplement to our motion for sanctions.

3 And both of those last two have been argued, heard,
4 and taken under submission per Special Master Order No. 7,
5 which was filed, I believe, yesterday.

6 THE COURT: Okay. Very good.

7 MR. GREGG: So, Your Honor, that's a rundown of the
8 documents in the binder we just gave you.

9 I'd also note that we think there are still
10 dispositive issues in this case. So if I were to put one last
11 thing on the laundry list of pretrial items that defendant
12 needs, I think it's time to file and brief dispositive motions
13 on issues relating to liability.

14 And because we got a damages expert in Phase II,
15 there may be some damages issues as well even though that was
16 a Phase I topic. But I think that's what we need to get this
17 ready for trial.

18 THE COURT: All right. Very good. Thank you.

19 MR. NORTON: Thank you, Your Honor. Ian Northon
20 here again.

21 Just to orient the Court a bit further, I've been
22 plaintiffs' counsel for the entirety of the lawsuit, all seven
23 years or so of it. And more recently, more recently about a
24 year, year and a half ago, I went in-house with a small
25 software company. I'm no longer a trial lawyer full time. I

1 spent the first 20 years doing that.

2 So as I transitioned away, I brought on additional
3 counsel, my old firm, Rhoades McGee, to pick up the slack and
4 take this the rest of the way to trial. That is Patrick
5 Sweeney, who could not be here today because he's in trial in
6 the Western District of Michigan. So he wasn't able to move
7 that on short notice to come here today.

8 But much of what defense has described has been
9 attributable to motions before Judge Ross and then, in our
10 view, kind of an overwhelming amount of potential discovery.

11 Phyllis Schlafly was engaged in public life for more
12 than 50 years. In Clayton she's got an archive that's open to
13 the public by appointment that has 50 years' worth of
14 information, but they're in things like hard copies, and they
15 don't lend themselves well to litigation or to electronic
16 discovery.

17 You also heard counsel refer to other cases. Those
18 other cases, the Madison County lawsuits -- there were many.
19 Phyllis Schlafly's estate, which was pending in St. Louis
20 County -- that's largely been resolved, at least as it relates
21 to the plaintiffs here, but there are a few ancillary issues
22 unaffected or unrelated. And then there was the Southern
23 District of Illinois federal intellectual property lawsuit
24 involving just the name "Eagle Forum."

25 I mention those things because Judge Ross, in this

1 case, stayed this litigation pending the resolution of those
2 cases for over two years, I think, by calendar count. So as
3 we look at that, to suggest that the documents produced or
4 that the defendants already have from those other cases aren't
5 relevant or important, I think is a bit of a distraction.

6 What we're really fighting over is the way or the
7 form in which those documents need to be delivered here. And
8 so what we've tried to do in order to get our arms around
9 everything that was produced in all of the cases and give fair
10 responses was to get everything institutionalized,
11 standardized, scanned, uploaded, and then, unfortunately, you
12 know, given back to the defendants in a new form.

13 That process -- clearly, my old firm and my
14 involvement have fallen behind the eight ball. We made
15 mistakes in hiring our vendors, and in doing so, that has put
16 us kind of in catch-up mode ever since.

17 With that said, when we went in to Judge Ross last
18 fall and said, We need these things. We have motions to
19 compel pending as well. Defendants had withheld privileged
20 documents. We believed they were not privileged. So we moved
21 to compel. They had cross-motions to compel. They had things
22 that they wanted.

23 And so that was when Judge Ross referred this to
24 Special Master. Now, I will admit most of what needed to be
25 delivered was we had to give back to the defendants things

1 that they either already had or in one form or another or were
2 publicly available in the archives. But we needed to do it.

3 And I believe we've endeavored in good faith,
4 especially Mr. Sweeney using these vendors, hiring additional
5 lawyers to beef up the team to try and give responsive
6 reports.

7 So in that process, we believe we've tried to comply.
8 We've done so in good faith. But all of those pending motions
9 last fall were referred to the Special Master to the extent
10 they related to discovery.

11 So now defendants' suggesting that they're still out
12 there -- I guess I would disagree. And as I'm leafing through
13 the binder, I don't believe these are pending. I believe
14 these issues have either been resolved or should have been
15 resolved through the Special Master.

16 For example, just recently Judge Ross issued an order
17 that claimed this motion to strike Dr. Huntoon was moot
18 because it had been sent to the Special Master.

19 Now, we met with the Special Master many, many times,
20 and not once did this issue reemerge, so to speak. And so
21 because of that, what Judge Ross did was denied the motion as
22 moot and said, "If you want to refile it, you can refile it.
23 But I would say give peace a chance. And if that's an issue
24 that should be brought before the Special Master, let's
25 resolve it there, let's put a bookend on it, and be done with

1 it before we come back here to resolve trial." But to suggest
2 that all of those things are pending, again, I disagree with.

3 Likewise, this motion for sanctions -- it is under
4 submission. Judge Seigel -- I believe, you know, he's taken
5 it under advisement and will issue his recommendation in short
6 order. But until then, we were facing down the barrel of this
7 looming trial. You know, it was supposed to be heard later
8 this month. And now we've brought on additional resources to,
9 one, close the gap on anything left for discovery, which we
10 think is narrow, get ready for trial, and move forward.

11 And now I'm hearing that defendants want to in a
12 sense reopen discovery, take more depositions, things that I
13 don't believe were raised with the Special Master. I mean,
14 they've canceled deposition dates and all of these other kind
15 of gymnastics. And to suggest that you could not do anything
16 on your end and then just wait until it was done and then
17 start Phase II, I think, does some abuse to the two years that
18 discovery has been open, and they've done very little to
19 advance their case except to throw stones at us.

20 So, again, I'd like to say that to orient the Court
21 but also then to focus on the substance, to really drill down.
22 The very narrow issue left over the privilege log -- we've
23 issued privilege logs in the case. There's a gap over the
24 predictive coding and the ability to draw the information and
25 get metadata. We're solving it. We've got new counsel.

1 We've spoken with the vendor. We're closing the gap. The
2 number of documents that are in dispute are going from 14,000,
3 you heard from Mr. Gregg, to 10,000. Now we believe the
4 actual number in dispute is about 1,500. Again, it's getting
5 narrowed very quickly.

6 We would anticipate that we could be done with that
7 with the Special Master within probably a week or so, but in
8 any event before the end of the month. That leaves, in our
9 mind, very little to do except get ready for trial.

10 Now, I say that to orient the Court to say, look
11 they're entitled to a complete privilege log. But to suggest
12 that this was kind of unequally yoked or we went into the
13 Special Master without having our own issues, there were a
14 tranche of documents that we just got from them that had been
15 withheld on the basis of privilege. Judge Seigel ruled that
16 they were not privileged, and they were turned over.

17 So, again, as we work through this, I don't want to
18 give the impression that -- look, the parties have been
19 fighting for over seven years for a reason. And so we're
20 doing our best as counsel to manage those efforts and put
21 forth a triable case to Your Honor and narrow the issues the
22 best we can.

23 I do think more time would be necessary. And I also
24 think it would take at least the semblance of any perceived
25 prejudice that the defendants feel they're having if we give

1 them more time. I don't want to turn this into an eight- or
2 nine-year case, but if we gave them a bit more time, a month
3 or two, then I think any concerns over privilege could be
4 obviated that way and we can get back to the merits.

5 In addition to that, I would say this idea that a
6 huge chunk of data from the other lawsuits and all of those
7 other things are somehow instrumental to the case -- again, I
8 would just use every opportunity I have to breathe, hopefully,
9 a breath of proportionality to Your Honor.

10 We brought what we thought was a fairly focused case
11 on the intellectual property of Phyllis Schlafly, the ability
12 to use her name and likeness and a few trademarks. And the
13 idea that we have to just kind of carte blanche through every
14 other lawsuit and the archives and somehow, if we don't do
15 that, we can't maintain a case -- as a plaintiff, I would just
16 ask the Court to exercise some discretion and caution against
17 that.

18 With respect to the specific requests to fix the data
19 set, it's being fixed. We believe we have straight answers.
20 And we also think in some ways it's moot.

21 Defendants asked for additional search terms.
22 They're right. Over the holidays, Christmas and New Year, we
23 worked tirelessly to get the production timely produced. We
24 did that unilaterally because we could not come to terms
25 through cooperative agreements on what the search terms would

1 be. So we charged ahead.

2 But since then, Your Honor, with the Special Master,
3 they gave us search terms. We ran those searches, and we gave
4 them the documents. The only documents we withheld were those
5 that we claimed were privileged. In other words, we don't
6 have to get into the technology-assisted review and the TAR
7 and these rates and their rates because we're not looking at a
8 percentage of documents withheld or trying to look at those
9 things. We gave them all to them. And we did that except for
10 the privileged items.

11 So if we solve that problem, I believe there are no
12 issues left with how the vendors previously did it because
13 it's irrelevant. They've now got the documents. Again, it's
14 a big stack, you know, 300,000 plus documents.

15 But at some point, when they've had their search
16 terms responded to, what else is there to do? Again, we've
17 offered them to go into the archives if they wanted. They've
18 declined. They just want us to do it for them. And at some
19 point we understand we have obligations as plaintiffs, but we
20 believe we're doing those in good faith. So I think that
21 takes that "fix the data set" issue off the table.

22 Second, they asked for the complete privilege log. I
23 agree. There were some gaps. These gaps are filled in by the
24 computers. They're extensive spreadsheets. They show what
25 the document is, what it isn't.

1 Every time we've showed documents to the
2 Special Master, he's agreed with us over privilege. In other
3 words, to the extent that they were withholding documents,
4 they were forced to produce them. To the extent we withheld
5 documents, they stayed withheld because they were privileged.
6 So on substance we think we're doing it the right way.

7 The procedure of what the Excel spreadsheet looks
8 like -- they still have issues with it. We can address it.
9 We're working to address it. Again, that's the issue that I
10 believe can be completed in very short order.

11 And it was just a -- it was the problem of taking a
12 document that -- in hard copy form and scanning it in and then
13 trying to use a computer to aggregate it. This is
14 complicated, but it happens. But we're fixing it.

15 And to the extent that I'm trying to fall on the
16 sword or say I'm sorry, I am, but the reality is, is the
17 substance of privilege documents hasn't changed.

18 You know, to say that the "to" and "from" field is
19 incomplete when it cc's the lawyer and it is described as an
20 email, we think that's fair. It's enough to at least raise
21 the issue and say, Your Honor, can you take a look at that
22 document to see if it's really privileged?

23 But to say just because their "to" and "from" field
24 is empty, well, that's a defect in the software. I can't fix
25 that today, but we can fix it the old-fashioned way, which is

1 to review every document and turn over what's not privileged.

2 With respect --

3 THE COURT: And cc'ing a lawyer doesn't make
4 attorney-client privilege. You know that.

5 MR. NORTON: No, no. I understand, Your Honor. But
6 when you cc a lawyer for the prospect of seeking legal advice
7 and go through the standard, those -- it identifies enough of
8 the document that, if they have an issue with it, we can
9 review it in camera or we can take issue.

10 It's not as if there's just some completely redacted
11 or blank that, yeah, the "to" and "from" fields might be
12 blank, but the other six fields or other ten fields are filled
13 in. So there's enough there to have a meaningful discussion
14 over whether privilege really applies.

15 With respect to the motion to strike the testamentary
16 expert, Dr. Huntoon, again, that was, I believe, pending at
17 the time Judge Ross referred all discovery matters to the
18 Special Master. It's not been brought up again. I believe,
19 fairly, if they want to bring it up, they should file a
20 motion, either a motion now or a motion in limine, and it can
21 be addressed on the merits.

22 But to kind of say it's pending and they want a
23 ruling on it, Judge Ross already denied it. He denied it
24 without prejudice. I'll have to check the docket number to
25 see what order he denied it with, but it's already been

1 denied.

2 So, again, to say, "Here you go, Your Honor. Here's
3 a binder of pending motions," well, it's not pending. It's
4 been denied, albeit without prejudice.

5 The next one, the idea that, you know, our damages
6 expert, Brian Buss -- they've taken five and a half hours of
7 his deposition already. They continued it or asked for it to
8 be continued because they thought they were entitled to more
9 documents -- what they thought were privileged were
10 non-privileged documents -- to ask him about.

11 That has been taken to Judge Seigel. Judge Seigel
12 issued his ruling. And we've set dates. It's been moved a
13 few times at their request, but it's going to be finished
14 tomorrow. Hour, hour and a half left to finish it. So I
15 don't think that needs to take any more of the Court's
16 attention.

17 But the idea that they now need time to file a motion
18 to strike, well, I suppose, but I don't know that we need to
19 cook it into the scheduling order or the calendar. Just make
20 it a motion in limine. We need to narrow the disputes, not
21 invite more of them.

22 Lastly, the idea that they need time to take, for the
23 first time in seven years, the depositions of a couple of
24 individuals who have been known to them the entire time --
25 that gives me a bit of heartburn. And to say they couldn't

1 take these depositions when, again, they're sitting on a
2 tranche of documents, of responsive documents -- that strikes
3 me more as to not preparing defenses in a meaningful way but
4 perhaps to harass plaintiffs and their representatives. But,
5 again, the Court will have to exercise some discretion there.

6 But to say that they need Dr. Schlafly, who we've
7 offered to them but had a busy schedule -- he's a practicing
8 surgeon. He has his own practice. We've offered his -- to
9 them many times. They've canceled repeatedly. And now I'm
10 hearing that they want him again.

11 Well, could have mentioned it to Judge Seigel when we
12 were negotiating all these things and working through the
13 discovery. But, again, we'll have to work through that.

14 JoAnne Jouett -- she's worked for the Eagle Trust
15 Fund for over 20 years. She is a trustee currently. She was
16 not when the case began but is now of the Eagle Trust Fund.
17 But she's been known to them. So to say that, "Oh, we want
18 her deposition now," again, fine, I suppose. But, again, this
19 strikes me as not narrowing the issues getting ready for trial
20 but expanding them, which I'd like to work against.

21 Lastly, the idea that they need additional time to
22 file dispositive motions, Phase I was focused on liability.
23 Phase I they filed motions for summary judgment. They were
24 denied. And Phase II has largely been focused on damages.

25 And now we sit here on the eve of trial, or what was

1 going to be the trial, and they say, "Oh, let's reopen things
2 for several months so the Court can rule on dispositive
3 motions." Well, you know, those deadlines have long gone. If
4 we move the scheduling order so that it kind of captures that
5 and opens up the opportunity to do that, I would just ask that
6 they do it quickly.

7 Nothing new here, Your Honor, respectfully. Those
8 motions could have been brought and should have been brought.
9 And, you know, the risk is that filing new motions in three or
10 four months then -- realistically, then, that this pushes our
11 ability to have the trial off until -- to another calendar
12 year, which I'd like to really resist and work against.

13 So I've tried to summarize the points without getting
14 too acrimonious. And I would just say, look, we've brought on
15 additional counsel to make up for the lack of resources, which
16 I regret. We are working in earnest to resolve what I think
17 are very narrow issues at this point, and we would ask that
18 Your Honor perhaps allow for trial maybe in the, I would say,
19 early fall, possibly October or late September, and do so.

20 I think that give enough time for them to avoid any
21 perceived prejudice, which I don't believe there is any actual
22 prejudice, and to resolve any outstanding issues in earnest so
23 that we can get this lengthy case resolved on the merits.

24 THE COURT: Anything further?

25 MR. GREGG: Your Honor, can I? I'll keep this as

1 brief as possible. I think --

2 THE COURT: Don't make promises you can't keep.

3 MR. GREGG: I said "as possible," Your Honor. That's
4 just a big asterisk for me.

5 So, Your Honor, this issue of fixing the data set,
6 Mr. Northon, respectfully, is conflating two separate ideas.
7 The problem here with the data set is that it was collected by
8 other lawyers in other lawsuits. That has nothing to do with
9 plaintiffs' own use of predictive coding. It has to do with
10 the collection. It has to do with what they have to search
11 for when they make -- when they use their TAR, when they use
12 their predictive coding.

13 So the metaphor I keep going back to is they've tried
14 to build a house on quicksand. If you don't have a foundation
15 of an accurate collection of all parties, then it doesn't
16 matter how good your collection is or how bad or good your
17 predictive coding is or your AI-assisted reviews if all the
18 stuff isn't there to be searched.

19 And here what we know is that arguably the two most
20 important individuals in this case, Ed Martin and
21 John Schlafly, their emails from a three-year period beginning
22 January of 2015 through December 31, 2017, which is when
23 plaintiffs say all the bad stuff happened -- those emails were
24 relied on by, were collected from other law firms for other
25 litigation. And plaintiffs' counsel can't say whether the

1 data was fully intact or whether search terms were run,
2 whether it was filtered, whether it's complete at all.

3 And my frustration, Your Honor, is the most
4 knowledgeable person about all the discovery and all of the
5 inner working we've been doing with Judge Seigel is
6 Patrick Sweeney. He's in trial today. The second most
7 knowledgeable person was Laura Kane, and Laura Kane is no
8 longer with the Rhoades McKee firm and is no longer with this
9 case.

10 So Mr. Northon has not been involved in the
11 e-discovery issues, has not been involved in working through
12 the privilege logs. I mean, I think that's my problem -- is
13 he's here talking about whether or not, you know, the
14 privilege log being complete even matters. And Judge Seigel's
15 already found that it mattered.

16 It already matters that there were missing -- that's
17 why he gave them an initial drop-dead date to fix this issue
18 on March 24. And then when they didn't do that, he gave them
19 an additional drop-dead date of April 19. And now we're here
20 to you, saying, well, we don't really think it matters that
21 the privilege log have "to" or "from."

22 I mean, that's -- that's bewildering to me because we
23 can't see who sent it. We can't see who the direct recipient
24 was. And it affects more than 4,000 of their 10,000 entries.

25 And, Your Honor, talking about delays for seeking

1 depositions, we needed documents to do a corporate rep
2 deposition. We needed full and complete disclosure discovery.
3 When we got a document dump in this matter on January 4, 2023,
4 more than a month after discovery cutoff was supposed to have
5 happened, there were 219,000 pages of documents produced,
6 composing about, I think, 22- or 23,000 separate documents.

7 We have a 22,000-document production and a
8 15,000-entry privilege log. They're withholding -- they're
9 withholding more than 50 percent of what they produced under
10 the basis of privilege, and we can't even examine the
11 privilege log.

12 And when we asked them and they were required to
13 supplement who was asserting the privilege, they said names
14 like Bruce Schlafly's asserting the privilege even though
15 Bruce isn't a party to this case or represented by these
16 attorneys in this case.

17 And that's why we're having an issue where we're
18 asking for discovery and depositions to occur after we
19 actually get the documents.

20 There have been 17 volumes of production since
21 January 4, 2023, as Judge Seigel has picked off and asked them
22 to provide more. They had all of their expert communications
23 on their privilege log. Those had to be produced. Emails
24 with Roger Schlafly, a third party, littered the privilege
25 log -- more than 700 entries. They were asked to produce

1 those by Judge Seigel. They produced 2,300 documents. They
2 were the wrong documents because there were still 400
3 documents that weren't produced.

4 This has been, I think, problematically flawed from
5 the get-go, and it's been affected by this bad data set. And
6 when Mr. Northon talks about fixing the data set, he's
7 ignoring the issue that his firm had no involvement in
8 collecting the core custodians for the core period of time.

9 Dr. Huntoon -- our motion to strike Dr. Huntoon as an
10 expert was filed on March 22, 2023, after his deposition,
11 during the Special Master proceedings.

12 And, Your Honor, I don't think I did -- and I
13 endeavored not to misrepresent to this Court why we had the
14 motion to strike expert disclosures in your binder. That was
15 denied by Judge Ross as moot with leave to refile.

16 Why I included it in the binder is because it's cited
17 and relied upon on our more recently filed motion to strike,
18 and I wanted Your Honor to have the full amount of information
19 in front of you.

20 But he's blurring and confusing the different motions
21 to strike the expert disclosures versus the motion to strike
22 Dr. Huntoon, which was filed on March --

23 THE COURT: Slow down so you get a record.

24 MR. GREGG: Sorry, Your Honor. Which was filed on
25 March 22 and has not been responded to at all by plaintiffs.

1 Even the phases -- Phase I, in this case, was focused
2 on, I believe, ongoing use, ownership, standing, and damages.
3 Phase I was not limited to the issue of liability, as
4 Mr. Northon just represented. In fact, I think the remaining
5 motions for summary judgment in Phase II relate almost
6 primarily to liability. So even the phases are mixed up
7 because the lawyers who know the most about plaintiffs' case
8 aren't here today to talk to you.

9 Well, that's my four topics, Your Honor.

10 THE COURT: All right. So we have certainly a motion
11 for sanctions under submission to the Special Master. Which
12 of these other discovery motions would be ripe for the
13 Special Master's consideration, and which are left for me?

14 The easy one is I'm vacating the CMO today until we
15 figure out where we are.

16 MR. NORTON: I would just suggest, Your Honor, that
17 although the original referral -- oh, my apologies.

18 Thank you, Your Honor. I would suggest that the
19 original --

20 THE COURT: Come up. You can share the podium.

21 MR. GREGG: Okay.

22 MR. NORTON: I don't bite.

23 THE COURT: If you can't share the podium, we'll
24 never get anywhere.

25 MR. NORTON: So I would suggest that, while the

1 original order of referral to the Special Master was cabined,
2 I think it was, 60 days, I think if we just simply extended
3 that, then all pending discovery disputes could still be
4 resolved by Judge Seigel and that --

5 THE COURT: I don't want to waste his knowledge of
6 the case at this point. It would be fruitless for us to start
7 over.

8 MR. NORTON: I agree. And that's why --

9 THE COURT: While you were all talking, I went back
10 to my Rules of Civil Procedure. And the one nobody reads is
11 Rule 1.

12 MR. NORTON: The just, speedy, and inexpensive --

13 THE COURT: Yeah. The just, speedy -- and all the
14 rules have to be read for the just, speedy, and inexpensive
15 determination of every action. We've probably passed that
16 threshold, but we don't need to make it worse.

17 MR. GREGG: I mean, Your Honor, I'd agree that I
18 think the motion to strike Dr. Huntoon as an expert -- I think
19 that can be referred to Judge Seigel.

20 I think our original motion for sanctions that was
21 filed -- I think it's Document 257. That's fully briefed. It
22 can be referred to Judge Seigel.

23 I would say, Your Honor, though, I think for the
24 motion to strike Dr. Huntoon that was filed on March -- I
25 mean, I'm fine referring that to Judge Seigel and we can have

1 a hearing on it, but there was never any response from
2 plaintiffs on that motion. And it was filed on the 22nd.

3 I mean, what I don't want is to have this motion be
4 converted into something that we talk to Judge Seigel about
5 and then we suddenly get a huge opposition to it when it's
6 been on file since the end of March.

7 SPECIAL MASTER SEIGEL: Your Honor?

8 THE COURT: Yes, sir.

9 SPECIAL MASTER SEIGEL: If I might, I'm just now
10 hearing about the motions to strike experts.

11 My thought, my initial thought was, well, I wasn't
12 sure I had the authority to hear those motions because they
13 were talking about striking experts for trial. I wasn't sure
14 if the Court would want me to address those or not.

15 THE COURT: I think striking experts stays with me,
16 and discovery disputes should be -- all of them within your
17 cabin as part of the Special Master.

18 SPECIAL MASTER SEIGEL: Okay.

19 THE COURT: But let's deal with the discovery issue
20 before we start making decisions about experts, unless you
21 feel you're in a position at this point to rule. I mean, all
22 of them, of course, are reports and recommendations. So I
23 could benefit from your insight if you feel like you want to
24 take it on.

25 MR. GREGG: Your Honor, if I'm hearing you

1 correctly -- and I agree with Your Honor -- I think then our
2 motion for discovery sanctions, Document 257, which is fully
3 briefed, we'd referred to Judge Seigel because it's a
4 discovery dispute even though it predates the referral of the
5 case to the Special Master. But then the motion to strike the
6 testamentary capacity expert, Larry Huntoon, that was filed in
7 March -- that will stay with you?

8 THE COURT: I mean, I'm at a little bit of a loss
9 because I don't know how intertwined these things are.

10 SPECIAL MASTER SEIGEL: Right. And, Your Honor, I
11 have no problem hearing the motion to strike that expert and
12 make a recommendation to the Court.

13 THE COURT: Let's proceed on that basis.

14 Obviously, you'll each get an opportunity to object
15 to the report, and I'll make a ruling, but that will package
16 it up better.

17 MR. NORTHON: Thank you. I think that helps
18 procedurally too because, you know, defense counsel is
19 suggesting that they're intertwined and related, and so this
20 gives us a chance to make the argument first to Judge Seigel
21 and then address anything that's left over.

22 THE COURT: Okay. So the CMO is vacated. These
23 motions are referred to the Special Master. He will file his
24 report and recommendation. You will have ten days to respond.
25 And then I will set a status conference after that, perhaps

1 for argument, or I will rule and we'll get back together again
2 and chart our path forward.

3 MR. NORTHON: Thank you, Your Honor.

4 THE COURT: Anything else while we're together?

5 MR. GREGG: No.

6 THE COURT: All right. Very good. Thank you all for
7 your time.

8 **(PROCEEDINGS CONCLUDED AT 12:05 PM.)**

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 34 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 21st day of August, 2023.

/s/Shannon L White
/s/Shannon L. White
Shannon L. White, CRR, RMR, CCR, CSR
Official Court Reporter